BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

PATRICK S. NOLES	)	
Claimant	)	
V.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,066,801
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the June 23, 2015, Award[1] entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on November 10, 2015.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Mark A. Buck of Lawrence, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The parties agreed the Board can consider the *Guides*[2] and can take judicial notice of *Noles v. State of Kansas*, Docket No. 1,066,939.

ISSUES

ALJ Sanders found claimant was entitled to work disability benefits because his whole body functional impairment is greater than 7½ percent and because his employment was not terminated for cause. The ALJ awarded claimant temporary total disability benefits

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[1] On June 25, 2015, the ALJ entered a Nunc Pro Tunc Award to correct the date of the Award to June 23, 2015.

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

(TTD) and permanent partial disability benefits (PPD) based upon a 12 percent whole body functional impairment and a 92.5 percent work disability. The ALJ found claimant was not entitled to future medical benefits.

Respondent contends claimant is not entitled to work disability benefits because his whole body functional impairment is less than 7½ percent. Further, respondent asserts claimant's employment was terminated because he refused to return to work within restrictions imposed in Docket No. 1,066,939 and his employment termination was unrelated to this claim. Respondent also contends claimant is barred from work disability benefits because he was fired for cause. Respondent argues the ALJ erred in computing claimant's wage loss and ignored Dr. Hodges' opinion that claimant has no task loss.

Claimant asserts he was not terminated for cause, but rather was fired as a result of communication failures by senior management. Claimant contends he is entitled to a work disability and Dr. Ketchum's opinions are more credible. Finally, claimant argues he is entitled to future medical benefits based on the significant chance of recurrent symptoms.

The issues before the Board on this appeal are:

1. What is claimant's functional impairment?

2. If claimant's functional impairment exceeds 7½ percent, is he eligible for a work disability award? Specifically, was his termination unrelated to his accident and was he terminated for cause?

3. If claimant is entitled to a work disability, what are his wage loss and task loss?

4. Is claimant entitled to apply for future medical benefits?

FINDINGS OF FACT

From May 2004 through July 2013, claimant was employed as a Mechanic II for respondent in its Readiness Sustainment Maintenance Section (RSMS), except when deployed with the Kansas National Guard to Kosovo from October 2004 through February 2006. His job duties were tearing down and rebuilding Army five-ton trucks and trailers, which required him to use air-powered grinders and other air impact tools.

As a result of claimant's job duties, he developed bilateral carpal tunnel syndrome. Dr. Peter T. Hodges performed a right carpal tunnel release on October 9, 2012, and a left carpal tunnel release on November 20, 2012. When asked about improvement following surgery, claimant testified, "I'll say the numbness and tingling's pretty much gone. Very rarely does that ever come up. Occasionally a bit sore and loss of strength and grip in my

hands a little bit."[3] Claimant testified he returned to work on January 3, 2013, after being released without restrictions by Dr. Hodges.

In May 2013, claimant began having right elbow complaints and filed an application for hearing in Docket No. 1,066,939. Dr. Rahila Andrews provided claimant with restrictions on Friday, July 12, for claimant's right elbow of no lifting, pushing or pulling over 10 pounds, no high impact activities (hammering, drilling) and no firm/repetitive gripping or torquing (removing rusted bolts). The doctor indicated claimant was off work until Monday, July 15. Claimant took these restrictions to his supervisor, Jim Bratcher, who told him to go home because accommodated work was not available. According to claimant, Mr. Bratcher kept workers off work unless they were 100 percent.

Claimant saw physician assistant Francis Koopman on July 19. The corresponding report indicated claimant had remained off work. Mr. Koopman continued claimant on the same restrictions. It is undisputed claimant took these work restrictions to his supervisor and his supervisor told him to go home because no accommodated work was available.

Claimant received a telephone call from Mr. Bratcher's supervisor, Dave Western. Claimant described that conversation as follows:

> Basically, my supervisor's supervisor called and informed me that they were willing to make arrangements to let me come back to work even though I was on restriction and -- or I had the option I could come back to work, but I talked with him on the phone and we determined it'd probably be better for me to stay home so I didn't further injure myself.
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> . . .
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> There was some confusion at some point, I believe. I'm trying to remember -- I think somebody was supposed to get back with me, so, I'd actually gone in and talked to Dave and then he went to his boss and then came back and told me that they'd worked it out and I'd get a phone call explaining what was going on later.[4]

Stephanie K. Burdett is the human resources director for the Kansas Adjutant General's Department. Ms. Burdett testified that when she receives work restrictions from a doctor for an injured worker, she faxes the restrictions to the State Self-Insurance Fund and indicates whether the restrictions can be accommodated. However, she usually contacts the work site first, to see if the restrictions can be accommodated.

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[3] R.H. Trans. at 16.

[4] R.H. Trans. at 20, 31.

Ms. Burdett testified Mr. Bratcher would not be aware of accommodated duties available to claimant. Ms. Burdett denied respondent had a policy that injured employees could not return to work unless they had no work restrictions. Ms. Burdett testified that Mr. Western had authority to determine if accommodated work could be provided to an employee with work restrictions.

Ms. Burdett contacted Mr. Bratcher and explained that he should be able to accommodate claimant's restrictions and that she would call claimant. Ms. Burdett testified she called claimant on July 23, 2013, but later testified the call was on July 19, not 23. Ms. Burdett testified she told claimant he needed to be at work or contact his workers compensation doctor to change his restrictions. Ms. Burdett told claimant that he could not make the decision whether to return to work because it was up to his workers compensation doctor. Ms. Burdett indicated claimant stated his supervisor said he could not be at work. Ms. Burdett replied that his supervisor was mistaken. Ms. Burdett testified that claimant then hung up on her. According to Ms. Burdett, she called claimant two more times and told him that he needed to be at work or to contact his workers compensation doctor to change the restrictions, but claimant hung up on her. She confirmed claimant's supervisors never called him to return to work.

According to claimant, when the human resources director called, claimant "was trying to explain to her the situation and she told me I didn't know what I was talking about and wouldn't let me speak, so, I just hung up on her."[5] He testified that no one at respondent told him to come back to work and he did not refuse to go back to work. Claimant testified he was aware of respondent's policy that if an employee is unexcused from work for a period of five consecutive days, he or she could be terminated.

Ms. Burdett testified she did not know what Mr. Bratcher and Mr. Western told claimant about his work status,[6] but stated Mr. Bratcher and Mr. Western were incorrectly applying what she viewed as respondent's accommodated work policy. Ms. Burdett testified claimant's supervisors were wrong to keep him off work. Ms. Burdett contacted respondent's site manager on July 19 and told him to tell his supervisors that all employees should be or are accommodated for work restrictions and she would make the decision regarding whether a worker could return to work with restrictions.[7] While claimant testified he never refused any work and respondent never told him to return to work, he was told by Ms. Burdett to return to work in their July 19 phone call.

Because, in Ms. Burdett's opinion, claimant was off work five or more consecutive working days on unauthorized leave, Ms. Burdett drafted a July 24, 2013, termination letter

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[5] *Id.* at 22.

[6] See Burdett Depo. at 42.

[7] See *id.* at 24-25.

signed by the Adjutant General. The letter indicated claimant was released to return to work with restrictions on July 15, 2013, and claimant should have returned to accommodated work on July 16, but failed to do so. The letter also states claimant was absent from work for five consecutive days and was being terminated. The record does not establish claimant was scheduled to work the weekend of July 20-21. The termination letter did not state claimant was fired for hanging up on Ms. Burdett or for insubordination.

Claimant testified that he "was called by HR and I was told I was being terminated because I refused to come back to work and that the policy of a hundred percent or go home didn't actually exist."[8] According to claimant, he never refused to go back to work on light duty. He testified he asked to come back and was told he was already terminated and there was nothing he could do about it.

Since being terminated from respondent, claimant has worked for his father-in-law, earning $9.25 per hour, working 10 to 20 hours per week. His duties include helping out where he can, dragging things to the trash receptacle, sweeping and occasionally hammering. Claimant indicated he has not looked for work anywhere else because he has post-traumatic stress disorder (PTSD) and is not good with going out and being around people with whom he is not familiar. He had no difficulty with his PTSD while working at respondent. No psychologist or psychiatrist has given claimant restrictions for his PTSD, but he has received a service-connected award of disability.

Dr. Hodges, board certified in orthopedic surgery, began treating claimant on October 2, 2012. The doctor diagnosed claimant with bilateral carpal tunnel syndrome and, as mentioned above, performed bilateral carpal tunnel releases. Dr. Hodges indicated an EMG conducted by Dr. Wade Welch showed moderate right and mild left carpal tunnel syndrome.

Dr. Hodges testified claimant reached maximum medical improvement (MMI) for his carpal tunnel syndrome on January 2, 2013, the last date the doctor saw claimant for his carpal tunnel syndrome. He did not order additional nerve conduction testing. Claimant's incisions were healed, he had no signs of infection, was nontender to palpation, could make a fist, wrist range of motion bilaterally was 70 to 80 degrees in palm flexion and dorsiflexion, sensation was intact and his grip strength was normal. Claimant also reported improvement. Dr. Hodges indicated his physician assistant tested claimant's grip and pinch strength as being within normal limits.

Using Table 16 at page 57 of the *Guides*, Dr. Hodges opined claimant sustained 5 percent right and left upper extremity impairments, which converted to a 6 percent whole body functional impairment. Dr. Hodges acknowledged the *Guides* provided for a 10 percent functional impairment for mild carpal tunnel syndrome, but he assigned only

[8] R.H. Trans. at 20.

5 percent. The doctor testified, "the [*Guides*] are a guide, and if I don't feel like that the patient has that percentage of what the [*Guides*] is telling me, then I use it as a guide, and then I give them a percentage of impairment based upon what my clinical examination was."[9] Dr. Hodges testified he usually assigns no functional impairment following carpal tunnel releases.

Dr. Hodges provided no permanent work restrictions. He took about 30 seconds to review a list of claimant's job tasks identified by rehabilitation consultant Karen Crist Terrill and opined claimant had no task loss. Dr. Hodges was aware claimant's job required physical labor and vibratory equipment and that by releasing claimant without restrictions, claimant would return to his regular job. Dr. Hodges could not say there would be a substantial likelihood claimant would have additional problems or a recurrence of his symptoms if he returned to his old job. The doctor testified there is a very low recurrence of carpal tunnel syndrome after carpal tunnel surgery. According to Dr. Hodges, claimant would not need future medical treatment for his carpal tunnel syndrome.

On November 13, 2013, at the request of his attorney, claimant was evaluated by Dr. Lynn D. Ketchum, board certified in plastic surgery, with a certificate of added qualifications in hand surgery. The doctor indicated claimant reported developing upper extremity issues from repeated use of power tools, repetitive motion and extreme use of vibratory tools.

Dr. Ketchum's examination showed claimant had: (1) a negative Tinel's sign bilaterally; (2) a positive Phalen's test bilaterally at 25 seconds; (3) key pinch strength on the right of 11½ pounds and 13 pounds on the left, with 25 pounds normal for claimant's age, size and occupation; and (4) normal grip strength. Dr. Ketchum performed a nerve conduction test that showed claimant's carpal tunnel syndrome improved from moderate to mild on the right and mild to borderline on the left. The doctor indicated that on the left, claimant was on the high side of normal. Dr. Ketchum indicated that because claimant was no longer reporting numbness, his median nerve was successfully decompressed.

Using Table 16 at page 57 of the *Guides*, Dr. Ketchum opined claimant sustained 10 percent right and left upper extremity impairments. He indicated Table 16 of the *Guides* showed three levels of median nerve entrapment – mild, moderate and severe – with 10 percent functional impairment assigned for mild entrapment. When asked about his rating of claimant's left upper extremity, Dr. Ketchum provided the following testimony:

> Q. Is there any rating that's provided under table 16 if a patient has EMG findings that are on the high side of normal?

[9] Hodges Depo. at 28-29.

> A. Well, that rating -- no. It would actually be less than that. But the reason that I rated him at 10 percent was because of the positive Phalen's test, the positive weakness of pinch strength, and weakness of endurance, which are things that were subsequent to his surgery.
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> Q. Again I don't want to put words in your mouth. But looking strictly at table 16.
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> A. Right.
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> Q. Loss of grip strength and pinch strength are not factors that you look at strictly under that table?
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> A. That's correct.
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> Q. If we look strictly at the table, meaning table 16, the left side problems would not be rateable under that table since he had a high side of normal nerve conduction testing?
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> A. Correct.[10]

Dr. Ketchum confirmed the *Guides* does not indicate whether a preoperative or postoperative evaluation should be used to rate an injured worker.

At the November 2013 evaluation, Dr. Ketchum did not impose restrictions and felt claimant could return to work. In a March 5, 2014, letter to claimant's attorney, Dr. Ketchum restricted claimant from using vibratory tools. The doctor testified he changed his mind because he thought if claimant were to perform his pre-injury job, he had an increased risk for recurrence. He testified the recurrence rate for carpal tunnel syndrome is 17 percent and 25 to 30 percent for someone using vibratory tools. The doctor did not recommend future medical treatment or testing for claimant.

Dr. Ketchum opined claimant could not perform eight of nine job tasks identified by vocational rehabilitation counselor Doug Lindahl for an 89 percent task loss. The doctor also testified that if the task he indicated claimant could perform involved using a vibratory tool, then claimant also could not perform that task.

Mr. Lindahl, at the request of claimant's counsel, evaluated claimant and reviewed records from Dr. Hodges and Dr. Ketchum, including the work restrictions Dr. Ketchum provided. According to Mr. Lindahl, for the past two years, he has testified for claimant's 100 percent of the time. Mr. Lindahl noted claimant worked only for respondent as a mechanic for the five years preceding his accident and he (Mr. Lindahl) discerned

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[10] Ketchum Depo. at 17-18.

claimant's job tasks by interviewing him. According to Mr. Lindahl, claimant's bilateral carpal tunnel releases will have an impact on his ability to find a job.

Mr. Lindahl testified claimant worked for his father-in-law, making $125 per week, but did not indicate what he was doing to obtain employment. Mr. Lindahl was able to find a janitorial job at Kansas State advertised paying $10.68 per hour that claimant may be able to perform. He testified that if claimant could not land the janitorial job, he was capable of making $7.25 to $9 per hour. Mr. Lindahl agreed that if Dr. Hodges' opinion that claimant had no work restrictions was adopted, claimant had no wage loss.

At the request of respondent, Ms. Terrill determined claimant's job tasks for the five years preceding his accident and evaluated his work history from a skills perspective. Ms. Terrill opined claimant has no wage loss if he has no work restrictions as Dr. Hodges opined. She testified that if claimant worked for his father-in-law full time at $9.25 per hour, he would make $370 per week. Considering Dr. Ketchum's restrictions, Ms. Terrill indicated claimant could work as a janitor making $429.20 a week or as a service writer making $509.20 a week. In forming her opinion that claimant could earn between $370 and $509.20 per week. Ms. Terrill testified she took into consideration claimant's PTSD.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(c) states claimant has the burden to establish the right to an award of compensation and to prove the conditions on which that right depends. "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[11]

K.S.A. 2012 Supp. 44-510e(a)(2), in part, states:

> (B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.
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> (C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
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> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is

[11] K.S.A. 2012 Supp. 44-508(h).

equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

. . .

(iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

K.S.A. 2012 Supp. 44-510h(e) states:

> It is presumed that the employer's obligation to provide the services of a health care provider . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

Claimant has a 9 percent whole person functional impairment.

The ALJ adopted Dr. Ketchum's functional impairment opinion and, converting and combining the 10 percent functional impairment for each upper extremity, awarded claimant a 12 percent whole body functional impairment. Both parties contend the opposing medical expert either did not use the *Guides* or used the *Guides* incorrectly.

Table 16 of the *Guides* indicates a 10 percent upper extremity functional impairment due to entrapment neuropathy is assigned for a "mild" degree of severity. Table 16 assigns no functional impairment when the degree of severity is less than "mild." EMG testing ordered by Dr. Ketchum indicated claimant went from a moderate degree of severity to a mild degree of severity on the right following his carpal tunnel release. Moreover, Dr. Ketchum found claimant had a positive Phalen's test on the right and decreased key pinch strength. Dr. Hodges opined claimant had a 5 percent right upper extremity functional impairment without benefit of a post-surgery EMG. The Board finds Dr. Ketchum's opinion that claimant has a 10 percent right upper extremity functional impairment is in accordance with Table 16 of the *Guides* and adopts the same.

A determination of claimant's left upper extremity functional impairment is more difficult. Dr. Ketchum's EMG testing showed claimant went from a mild degree of severity to borderline on the left following surgery. Dr. Ketchum acknowledged Table 16 of the *Guides* provides for no impairment for that degree of severity. However, Dr. Ketchum noted he assigned claimant a 10 percent rating because claimant had a positive Phalen's test on the left, pinch strength weakness and lack of endurance. Dr. Hodges assigned a 5 percent left upper extremity functional impairment. The record does not indicate he conducted a Phalen's test. Dr. Hodges determined claimant had normal pinch strength.

Tovar[12] allows the Board to weigh the evidence and make its own conclusions as to claimant's functional impairment. In *Tovar*, one physician opined claimant had a 15 percent functional impairment while others opined 2 percent. The district judge concluded claimant sustained a 9 percent functional impairment. While Mr. Tovar argued there was

[12] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, Syl. ¶ 1, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

simply no evidence presented on which the district court could have based its finding of a 9 percent impairment, the Kansas Court of Appeals affirmed, stating:

> The existence, nature, and extent of the disability of an injured worker is a question of fact. Medical testimony is not essential to the establishment of these facts. Thus, the district court, as the factfinder, is free to consider all of the evidence and decide for itself the percentage of disability. The numbers testified to by the physicians are not absolutely controlling.[13]

The Board finds claimant has a 5 percent left upper extremity functional impairment for the following reasons:

- Claimant's work injury caused him to have mild left carpal tunnel syndrome that required surgery.

- A post-surgery EMG ordered by Dr. Ketchum showed a borderline degree of severity.

- According to Dr. Ketchum, claimant had a positive Phalen's test and a loss of key pinch strength.

- Drs. Hodges and Ketchum indicated claimant had at least a 5 percent left upper extremity functional impairment.

- Claimant testified that occasionally his wrists are sore and he has some loss of strength and grip in his hands.

Pursuant to Table 3 of the *Guides*, claimant's 10 percent right upper extremity functional impairment converts to a 6 percent whole person functional impairment and his 5 percent left upper extremity functional impairment converts to a 3 percent whole person functional impairment. Using the Combined Values Chart in the *Guides*, claimant has a 9 percent whole person functional impairment, which under K.S.A. 2012 Supp. 44-510e(a)(2)(C)(i) potentially qualifies claimant for a work disability.

Claimant is entitled to a 76 percent work disability.

At oral argument, respondent asserted claimant's termination was unrelated to his accident and that any wage loss was not caused by the injuries that gave rise to this claim. Rather, respondent argued claimant was terminated for his actions associated with his right elbow workers compensation injury. Therefore, respondent argues it is unnecessary for the Board to determine if claimant was terminated for cause, because his wage loss was

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[13] *Id.*

not caused by his bilateral carpal tunnel syndrome. This issue was not raised by respondent to the ALJ, nor in respondent's brief to the Board.

K.S.A. 2012 Supp. 44-555c(a), in part, states:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

The Board has frequently declined to exercise de novo review when an issue was not raised and limited review to "questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."[14] The Board will not hear this issue on appeal.

Arguendo, if we considered respondent's argument that claimant's wage loss is due to his right elbow injury, there is insufficient evidence claimant's wage loss is due to such injury. In a roundabout way, claimant lost his job, and thus his income, because Ms. Burdett believed claimant should have returned to work earlier in connection with his right elbow restrictions. However, the only evidence regarding wage loss focuses on the claim at bar. Both vocational experts provided opinions regarding claimant's wage earning capacity based on his restrictions (or lack thereof) for his carpal tunnel syndrome. No expert indicated claimant had wage loss caused by his right elbow injury.

Respondent next argues claimant's wage loss is not attributable to his work injury because his employment was terminated for cause – violating respondent's attendance policy.[15] Under K.S.A. 2012 Supp. 44-510e(a)(2)(E)(i), an injured worker's wage loss is not attributable to the work injury if the worker's employment was terminated for cause.

The Board has the duty to assess respondent's listed reason for terminating claimant's employment. Claimant argued to the Board that he was not terminated for cause because respondent's supervisors and Ms. Burdett gave him different information regarding his work status. Claimant having two supervisors telling him to stay home, while Ms. Burdett gave contrary information, is understandably confusing. The ALJ specifically found it was not clear to claimant or her if and when claimant was to return to work. The ALJ also specifically concluded claimant tried to tell Ms. Burdett that his supervisor had told

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[14] See K.S.A. 2012 Supp. 44-555c(a); *Byers v. Acme Foundry, Inc.*, No. 1,056,474, 2013 WL 6382905 (Kan. WCAB Nov. 21, 2013). See also *Hunn v. Montgomery Ward*, No. 104,523, 2011 WL 2555689 (Kansas Court of Appeals unpublished opinion filed June 24, 2011).

[15] See Respondent's Brief (dated May 15, 2015) at 11 (incorporated to respondent's Aug. 6, 2015, letter brief to the Board).

him not to return to work until he was restriction free, but he hung up on her because he felt she was not listening to him.

Respondent carries the burden to prove it discharged claimant for cause.[16] *Morales-Chavarin*[17] sets forth what constitutes "good cause to terminate" an employee. The Kansas Court of Appeals in *Morales-Chavarin* wrote:

> [T]he proper inquiry to make when examining whether good cause existed for a termination in a workers compensation case is whether the termination was reasonable, given all of the circumstances. Included within these circumstances to consider would be whether the claimant made a good faith effort to maintain his or her employment. Whether the employer exercised good faith would also be a consideration. In that regard, the primary focus should be to determine whether the employer's reason for termination is actually a subterfuge to avoid work disability payments.

Without dispute, claimant took his July 12, 2013, right elbow restrictions from Dr. Andrews and his July 19 right elbow restrictions from Mr. Koopman to his immediate supervisor, Mr. Bratcher. Mr. Bratcher, after receiving work restrictions from claimant for his right elbow, told him not to return to work until he had no restrictions. Mr. Bratcher's supervisor, Mr. Western, concurred. Mr. Western told claimant he would receive a telephone call explaining things.

The human resources director, Ms. Burdett, called claimant on July 19, 2013, and told him to report to work or contact his workers compensation doctor to change his restrictions. According to Ms. Burdett, she called claimant at least three times and he hung up on her. According to respondent, claimant's employment was terminated after he accumulated five unexcused absences.

On July 23, 2013, when claimant was terminated, he had not accumulated five consecutive unexcused absences. The termination letter indicated claimant had not returned to work since July 16. Ms. Burdett became aware claimant was not working on July 19 and called him. Claimant was off work from the time he gave his restrictions to respondent, until July 19. With the permission of Mr. Bratcher and Mr. Western, claimant remained off work. Thus, from July 16 through at least when Ms. Burdett called claimant on July 19, claimant's absences from work were excused, because both Mr. Bratcher and Mr. Western told claimant he could not work with restrictions. When claimant was terminated on July 23, he only had at most three unexcused absences, July 19, 22

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[16] *Gutierrez v. Dold Foods, Inc.*, 40 Kan. App. 2d 1135, 199 P.3d 798 (2009).

[17] *Morales-Chavarin v. National Beef Packing Co.*, No. 95,261, 2006 WL 2265205 (Kansas Court of Appeals unpublished opinion filed Aug. 4, 2006), *rev. denied* 282 Kan. 790 (2006).

and 23.[18] Again, there is no evidence claimant was expected to work the weekend of July 20-21. The actions of Mr. Bratcher and Mr. Western, correct or incorrect, were the actions of respondent and respondent should not be allowed to use their assurances to claimant's detriment. When all the circumstances are considered, respondent failed to prove claimant was terminated for cause.

With respect to any concern that claimant was terminated for cause because he hung up on Ms. Burdett's phone calls, such rationale was not the reason respondent terminated claimant's employment. Had respondent terminated claimant's employment for being rude or insubordinate, perhaps a discussion of that hypothetical situation could be explored.

The Board adopts the ALJ's findings and conclusions regarding claimant's 100 percent task loss. Dr. Ketchum's work restrictions against using vibratory tools, while belated, are more appropriate than Dr. Hodges' complete lack of restrictions. Dr. Ketchum testified claimant's risk of reinjury would increase if he used vibratory tools. Dr. Hodges simply could not say if claimant faced risk of reinjury by returning to his same job. Also, claimant testified his hand symptoms returned after he resumed regular work without restrictions.

Dr. Ketchum testified claimant lost the ability to do all nine of the tasks identified by Mr. Lindahl, assuming task no. 8 – using an air grinder – involved vibratory equipment. Claimant testified the grinders he used involved vibration.

Both vocational experts testified regarding claimant's wage earning capability based on his bilateral carpal tunnel syndrome and restrictions, or lack thereof. This is the only actual evidence in the record regarding wage loss. There is no evidence claimant's wage loss is due to his right elbow injury.

Mr. Lindahl testified claimant could earn $427.20 per week using Dr. Ketchum's restrictions. Ms. Terrill indicated claimant could earn $429.20 and perhaps as much as $509.20. The Board concludes claimant has the capability of earning $428.20 per week. We disagree with the ALJ's use of claimant's actual post-injury earnings to determine his wage loss. Claimant's actual post-injury earnings do not represent his wage earning capacity as based on the expert testimony. The Board specifically finds the presumption in K.S.A. 2012 Supp. 44-510e(a)(2)(E) has been overcome by competent evidence. Compared to claimant's pre-injury average weekly wage with benefits of $894.39, claimant has a 52 percent wage loss.

Averaging claimant's 100 percent task loss and 52 percent wage loss, he has a 76 percent work disability.

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[18] July 20 and 21, 2013, fell on Saturday and Sunday.

Claimant is not entitled to future medical treatment.

K.S.A. 2012 Supp. 44-510h provides a presumption that respondent's liability for medical expenses terminates upon the injured worker reaching MMI, unless medical evidence proves it is more probably true than not additional medical treatment will be necessary.

Claimant requests future medical treatment and notes Dr. Ketchum testified the recurrence rate for carpal tunnel syndrome is 17 percent and 25 to 30 percent for someone using vibratory tools. The possibility of a condition recurring and the need for medical treatment are not the same. Neither Dr. Hodges nor Dr. Ketchum recommended future medical treatment. Accordingly, the Board finds claimant failed to rebut the presumption that respondent's liability for medical expenses terminates upon MMI.

CONCLUSION

1. Claimant sustained a 10 percent right upper extremity and a 5 percent left upper extremity functional impairment, which convert and combine to a 9 percent whole person functional impairment.

2. Claimant was not terminated for cause and is entitled to a 76 percent work disability.

3. Claimant is not entitled to future medical benefits.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[19] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board:

1. Modifies the Award by finding claimant sustained a 9 percent whole person functional impairment and a 76 percent work disability.

The claimant is entitled to 12.71 weeks of temporary total disability compensation at the rate of $441.62 per week or $5,612.99, followed by 35.57 weeks of permanent partial disability compensation at the rate of $441.62 per week or $15,708.42 for a 9 percent whole person functional impairment, followed by 190.66 weeks of permanent

[19] K.S.A. 2014 Supp. 44-555c(j).

partial disability compensation at the rate of $570 per week or $108,678.59 for a 76 percent work disability and a total award not to exceed $130,000.

As of January 27, 2016, there would be due and owing to the claimant 12.71 weeks of temporary total disability compensation at the rate of $441.62 per week in the sum of $5,612.99, plus 35.57 weeks of permanent partial disability compensation at the rate of $441.62 per week in the sum of $15,708.42, plus 130 weeks of permanent partial disability compensation at the rate of $570 per week in the sum of $74,100, for a total due and owing of $95,421.41, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $34,578.59 shall be paid at the rate of $570 per week until fully paid or until further order from the Director.

2. Affirms the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
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Honorable Rebecca A. Sanders, Administrative Law Judge